Thomas P. Miller, Responses to Member Questions for the Record

February 5, 2019 Hearing, "Texas v. U.S.: The Republican Lawsuit and Its Impacts on Americans with Pre-Existing Conditions"

The Honorable Michael C. Burgess, M.D. (R-TX)

1. Mr. Miller, your testimony points out that this lawsuit is in its relatively early stages, projecting that the final decisions could be as much as another 16 months away.
    a. It's true that the Texas judge stayed the decision while the case is appealed, correct?

Thomas P. Miller

Yes, Dr. Burgess. Judge O'Connor on December 30, 2018 issued a stay of the court's December 14, 2018 Order, and the Partial Final Judgment severing Court I of the state plaintiffs' complaint and finalizing that Order, during the pendency of the Order's appeal.

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    b. In a time when liberal courts are rampantly legislating from the bench by issuing nationwide injunctions, do you believe this judge demonstrated judicial restraint by issuing a stay?

Thomas P. Miller

Judge O'Connor already had provided no inclination to issue a nationwide (let alone *any)* injunction, so his ruling technically would be limited in any case to the Northern District of Texas, United States District Court, and to the parties directly involved (including 20 states as plaintiffs, and several federal government agencies as defendants). You are correct in pointing out the exercise of more expansive, overreaching judicial actions in recent years by some other federal court judges in issuing nationwide injunctions on a more sweeping basis. Judge O'Connor's decision was more in keeping with traditional views of the limits of the powers of federal district court judges. In that sense, it demonstrated a more appropriate degree of judicial "restraint" in recognizing the roles of other courts, particularly at the appellate level, in reaching more conclusive rulings on a regional, and ultimately national, basis. He also took into account such factors as the potential for disruption to healthcare markets if immediate implementation of his ruling was required, as well as the fact that coverage decisions by many individuals for 2019 (particularly those facing open season time limits for ACA exchange coverage) already had been made.

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c. And would you please walk us through the remaining steps to get to an ultimate decision?

Thomas P. Miller

Although there are a wider number of future possibilities ahead, a simplified overview of the stages ahead would include:

- Scheduling of briefing and oral argument for the appeal in the 5th Circuit of the district court's final order for partial summary judgment
- A ruling by a 5th Circuit three-judge panel, either on the merits of the case, or perhaps a different ruling on standing of the appellees/plaintiffs
- The possibility of an en banc review of that panel's decision, by the entire roster of 5th Circuit judges, which could either affirm or overturn the previous ruling.
- Disposition of a petition for certiorari, by the losing parties at the 5th Circuit level, for final appellate review by the Supreme Court of United States. Given the projected unlikelihood of any other potentially similar cases in other federal appellate courts reaching that stages near a similar time as this one, the reasonable forecast would be that SCOTUS would be much more likely to grant cert for a final 5th Circuit ruling that affirmed some, if not all, of the original states/plaintiffs' claims and determined that very limited, if any, severability would apply to findings of an unconstitutional provision in the Affordable Care Act.
- If the case reached this stage, scheduling for briefing and oral argument at the Supreme Court would further extend the timeline for a final decision to as late as June 2020.
- Even if SCOTUS issued a final ruling more favorable to the state plaintiffs, the Court might then consider further transitional delays in structuring such judicial relief, in order to accommodate necessary adjustment time needed for federal policymakers and health care markets.
- At any time before such a final decision, other parties (primarily Congress) would preempt some, if not all, of the issues before the courts by changing the underlying ACA law, such as its previous (and current) findings of fact regarding the connection between the individual mandate and other ACA provisions, or perhaps reconsidering the status of the individual mandate and its potential tax penalties.

In short, a potentially long, winding, and uncertain road for further litigation remains ahead.

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2. Mr. Miller, I'd like to highlight an excerpt from your written testimony. This is a direct quote: "Poorly drafted bills, full of complex and ambiguous terms and overly ambitious but untested mechanisms that lack sufficient and sustainable political support but are pushed into law by whatever means are necessary have substantial negative spillover effects."

3. Now, I understand that you also followed and contributed to previous challenges to the constitutionality of Obamacare. One of those challenges, NFIB v. Sebelius, is relevant to this case.

4. Here's an excerpt from Justice Roberts' opinion: "The Affordable Care Act contains more than a few examples of inartful drafting. (*To cite just one, the Act creates three separate Section 1563s. See 124 Stat. 270, 911, 912.) Several features of the Act's passage contributed to that unfortunate reality. Congress wrote key parts of the Act behind closed doors, rather than through "the traditional legislative process."*

a. Now, Mr. Miller, is it your view that a traditional legislative process – one that includes a subcommittee hearing, subcommittee markup, full committee markup, Rules committee markup, and floor consideration – could have limited the judicial scrutiny of the constitutionality of Obamacare?

Thomas P. Miller

A more traditional process would have helped limit, though not eliminate, some of the flaws in the final ACA law narrowly approved by Congress in March 2010. However, textualist judges tend to rely much less on such secondary sources of "legislative intent" in interpreting the meaning of statutory provisions under constitutional challenge. Of course, the ACA exhibited an unusually large number of ambiguous, contradictory, or poorly drafted provisions. The House-side of its development had its flaws, including extensive rewriting behind closed doors in the Speaker's office as reaching agreement after the work of three separate committees bogged down in the fall of 2009. But the Senate process was far worse, and its unrefined final product, also the result of extensive late-stage rewriting in the Majority Leader's office – narrowly passed in late December 2009 within the constraints of a 60-partisan-vote requirement, became the unfortunate incubator of many legal problems to come.

When the then-Democratic congressional leadership decided to pass a final bill by any means necessary to bypass a Senate Republican filibuster in early 2010, it had to swallow many of the evasions, ambiguities, and contradictions embedded in the final Senate bill and then hope for the best later through executive branch reinterpretations and administrative work-arounds. The decision to bypass any House-Senate conference committee process, as well as a conference report providing a better understanding of what Congress actually intended, transferred ultimate resolution of important decisions to the creative vagaries of administrative rulemaking and extensive litigation; most notably in the King v. Burwell line of court cases. The "clean up" of the Senate's work in December 2009 never happened, apart from very limited changes in the

HCERA reconciliation bill that accompanied the final ACA in March 2010. Without enough votes to reopen Senate consideration of changes to its older bill, the Democratic Congress and the Obama White House chose to accept the ACA, warts and all, as an unfinished product that was the only thing they could enact into final law.

The primary constitutional challenges to the ACA, involving the individual mandate and the Medicaid expansion, would have developed in any case. They were less issues of "interpretation" than those of political judgments regarding what would (or even needed to) pass constitutional muster. The then-Democratic majorities in Congress had a different view of binding constitutional limits than several courts later determined.

In general, a more thorough and better-documented legislative process is most valuable in subjecting questionable or less-workable mechanisms and assumptions to greater scrutiny and challenge, so that they become more realistic, resilient, and practical; as well as more politically acceptable. Both sides of the partisan divide in Congress have yet to absorb that lesson, in seeking quicker procedural end-runs around the need to assemble more sustainable majorities to support complex and controversial legislative products. Real compromises involving sweeping health policy legislation are clearly difficult to achieve, but they prove far more sustainable than the ACA's desperate struggle to reach a then-unpopular and chronically-unworkable finish line.

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> 5. The 11 members of this subcommittee who helped write Medicare for All last Congress have yet to show the American people their bill this year.
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> > a. Mr. Miller, in an attempt to avoid continued judicial scrutiny of Democrats' radical health care agenda, do you think a better use of today's time would be to start the traditional legislative process on Medicare for All, so America can learn how the 11 members of this subcommittee want to dangerously change health care in America?

Thomas P. Miller

That's a tough call. I usually leave it up to members of Congress as to how they might wish to waste their time…and in some ways, the less time spent on Medicare for All, the better! The leaders of the House majority and its committees certainly have the right to set their own agendas and legislative priorities. That's what elections help determine, at least every two years in the case of the House.

Of course, in the larger sense, greater transparency and debate over what is involved beyond simplistic rhetorical phrases would be more helpful to voters and other potentially affected parties. Many members of Congress have yet to learn the lessons of the past few decades that unveiling complicated and divisive legislative provisions near the last minute, with only limited vetting and feedback from the general public, is particularly unwise and counterproductive when it comes to health policy. A good bit more stress testing, and political reality checks, in advance can limit, if not avert, future disasters.

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6. Mr. Miller, one portion of your written testimony really resonated with me. I'm going to highlight a few points. This is taken directly from your testimony: "When congressional action produces a flawed legislative product, justified in large part by mistaken premises and misrepresentations, it won't work well."

7. I'm concerned that Democrats are once again moving towards a flawed legislative product based on mistaken premises and misrepresentations -- that being the government-run, single-payer Medicare for All.

a. Mr. Miller, do you believe the rhetoric of Medicare for All matches the reality of what the proposal would do to America's health care system?

Thomas P. Miller

No, it does not. That's not unusual per se when it comes to most initial iterations of what are termed "national health care reform." However, the gap between Medicare for All's inflated and unworkable rhetoric and its hidden realities may help set new records. The longest leaps tend to involve cost estimates, structural disruptiveness, implementation challenges, transition times, degrees of coerciveness, political acceptability, and the consequences of rerouting a much larger share of our society's resources through already overloaded political channels.

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8. It's my understanding that the bill 11 Democratic members of this subcommittee helped write last Congress would lead to the largest tax increase in American history, pave the way to close the VA, and Indian Health Service, eliminate private health insurance – for employees and unions – and possibly lead to wait times and delays in access.

a. Is this your understanding of Medicare for All, Mr. Miller?

Thomas P. Miller

Those all are plausible starting assumptions, but I'm a little uncertain whether those are considered to be "features" or "bugs" by Medicare for All advocates. In any case, it remains the case that the closer one gets to considering actual approval of Medicare for All legislative proposals, as opposed to vague slogans, the further away decisive majorities will decide to run.

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9. You go on to write, and here's another quote: "The ACA's architects and proponents oversold the effectiveness and attractiveness of the individual mandate, touting it as an essential part of the balancing act of subsidies and regulation that could hold the law's insurance coverage provisions together…"

10. This sounds strikingly familiar – like the chairwoman of this committee, who along with 11 members of this subcommittee helped write Medicare for All last Congress, are overselling the effectiveness and attractiveness of Medicare for All without fully explaining how Medicare for All works.

a. Mr. Miller, since you've explained that this lawsuit is stayed and it could be as many as 16 months until a final decision is issued, would a better use of this subcommittee's time be to educate the American people on Medicare for All?

Thomas P. Miller

Particularly when it comes to national health care legislation, the best surprise is no surprise, because early debate and review at least can help head off last-minute mishaps built on untested assumptions. But based on past experience, the American people may have to rely on wider and more diverse sources of information that what has been developed through the congressional committee process alone. In fact, they first may need to educate subcommittee members about the type of health care system they not only need and prefer, but that they can accept and afford. THAT process seems to be a never-ending challenge, but it certainly appears likely to take more than 16 months for both sides of that equation to reach a better solution, in any case.